Supreme Court, U.S
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No. 10-1196

In The Supreme Court of the United States

NOVARTIS PHARMACEUTICALS CORPORATION,

Petitioner,

v.

PEGGY L. STEVENS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Montana

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1) Should this Court grant certiorari where the Petitioner failed to raise a federal issue to the Montana state courts and where no federal issue was decided?

2) Where the decision of Montana's highest court is based solely on state law grounds, does this Court possess jurisdiction to grant this petition for certiorari?

3) Even if the Petitioner had properly raised a federal issue in state court, should this Court grant certiorari where Petitioner fails to identify any prejudice, unfairness, or lack of due process as a result of being named a party-defendant in this lawsuit just three years and ten months after Respondent became aware of her injury and within a few months of when she first learned that Petitioner was responsible for her injury?

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STATEMENT OF THE CASE

A. Introduction

After a week-and-a-half long jury trial, Peggy Stevens was awarded damages from Novartis Pharmaceuticals Corporation for failure to warn her that she could develop debilitating osteonecrosis of the jaw following a dental procedure while receiving its drug, Zometa. During the trial and on appeal to the Montana Supreme Court, Petitioner raised only garden variety issues of state tort law. The Montana Supreme Court issued a well reasoned and carefully limited opinion addressing those tort issues, including state law on the statute of limitation and tolling. There was no federal issue raised or decided in the courts below and no colorable federal issue for this Court to decide.

B. Factual Background

On January 18, 2008, Peggy Stevens filed a timely complaint in state district court in which she alleged that after being diagnosed with follicular lymphoma in October, 2000, she was treated with Zometa from April of 2002 through March of 2005 (Comp., ¶¶5, 6). She alleged that on September 27, 2004, she had a tooth extracted after which she developed mandibular pain which was diagnosed as osteonecrosis of her right mandible (ONJ) on March 18, 2005 (Comp., ¶¶8, 9, 10). She alleged that her oncologist was negligent for failing to advise her of the need to avoid tooth extractions while being treated with

Zometa and that that negligence was the cause of her ONJ and resulting damages. (Comp., ¶¶11, 12, 16 and 18)

The complaint also named as defendants, "John Does 1 through 5" and alleged that they were other individuals or entities whose conduct may have contributed to plaintiff's injuries but who were then unknown to the plaintiff. (Comp., ¶4)

C. Procedural History

On January 13, 2009, after learning that her physician had not been fully informed about the risks from Zometa,[1] Respondent amended her complaint to substitute the Petitioner, Novartis Pharmaceuticals Corporation, for John Doe 2 and added an alternate allegation that if Petitioner had not provided timely notice to her oncologist about the potential for ONJ from a tooth extraction while being treated with Zometa, then Petitioner was negligent and was the cause of her injury. (Comp., ¶20)

Petitioner moved that the amended complaint against it be dismissed based on Montana's three-year statute of limitation for personal injury actions.

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[1] Information regarding what Petitioner actually knew about the drug's risks compared to what doctors had been told was concealed by a confidentiality order which was a condition to discovery in federal multi district litigation (*In re Aredia and Zometa Prods. Liab. Litig.*, No. 3:06-MD-1760 (M.D. Tenn. Aug. 16, 2006)).

(2/26/09 Mtn., 2) It argued that because her condition was diagnosed on March 18, 2005, and because the statute began to run when she discovered the cause of her injury, the statute expired in March of 2008 and that her amendment to substitute it for a fictitious John Doe defendant, as authorized by §25-5-103, Mont. Code Ann. ("MCA") did not relate back to the original complaint because the plaintiff was aware of its identity at the time of the original complaint. (12/26/09 Brf., 2-7) ***Petitioner did not argue that its ability to defend itself had in any way been impaired by its addition as a party ten months after it complained the statute had run and made no suggestion that its right to due process was implicated.***

Based on the applicable authorities, the state district court agreed with Stevens that §25-5-103, MCA allowed relation back to the original complaint if she had previously been unaware of Petitioner's connection to her injuries and denied its motion to dismiss or in the alternative for summary judgment. (Order, 4/8/09, 3-6)

Nevertheless, Petitioner renewed its motion for summary judgment based on the statute of limitation shortly prior to trial, five months later. Petitioner's arguments were identical and, once again, ***omitted any suggestion that its defense had been impaired or that its right to due process had in any other way been affected when it was substituted as a defendant ten months after it contended the statute of limitation had run***. (9/11/09

NPC Brf. 8-14) In response, Respondent cited the court to the same authorities on which she had previously relied. She also contended that, in any event, the statute of limitation was tolled during the pendency of previous class actions, at least one of which sought identical relief from the same defendant, and that after deducting the tolled time period, her complaint was timely with or without the fictitious defendant statute. (9/28/09 Resp., 16-19) She cited the district court to *Anderson, et al. v. Novartis Pharmaceuticals Corporation*, No. 3:05-0719 (M.D. Tenn.), filed on September 15, 2005, and dismissed twenty-six months later on November 14, 2007.[2]

Although there was no Montana case on point, Respondent cited *American Pipe and Construction Company v. Utah*, 414 U.S. 538 (1974); and *Crown, Cork and Seal Company v. Parker*, 462 U.S. 345 (1983) for the principle that tolling pending a class action is a reasonable compromise between the interest in timely notice served by statutes of limitation and the judicial economy furthered by Rule 23, Fed. R. Civ. P., which authorizes class actions. She cited

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[2] As pointed out by Petitioner on p. 15 of its reply brief submitted to the Montana Supreme Court, three substantially identical class action suits were filed against it on the same day. *Anderson* pertained to patients who received both Zometa and Aredia. *Becker v. NPC*, No. 3:05-0719 (M.D. Tenn.) pertained to plaintiffs who had received only Zometa and included allegations about failure to warn identical to those in this case. It is the *Becker* case on which the Supreme Court of Montana relied to toll the statute of limitation.

Tosti v. City of Los Angeles, 754 F.2d 1485 (9th Cir. 1985) for the principle that tolling applies whether class certification is granted or denied, and *Staub v. Eastman Kodak Co.*, 726 A.2d 955, 963 (N.J. Super. Ct. App. Div. 1999) to demonstrate that most state courts to consider this issue have held that the pendency of a putative class action which does not achieve class status tolls the applicable statute of limitation for the benefit of any individual claimant who would have been a class member if the class had been certified. (9/28/09 Resp., 17-19)

Petitioner filed a reply brief in support of its motion for summary judgment based on the statute of limitation. Its argument was threefold: 1) several states, including those cited to this court, had rejected the idea of tolling a state action based on a federal class action; 2) plaintiff was not within the class sought to be certified in the *Anderson* case which she cited (although it acknowledged she would have been a member of the class for which certification was sought in the *Becker* case); and, 3) that tolling should not result from tort class action due to the unlikelihood that typicality can be satisfied pursuant to Rule 23(a).[3]

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[3] However, Petitioner incorrectly attributed that conclusion to the California Supreme Court, citing *Jolly v. Eli Lilly & Co.*, 751 P.2d 923 (Cal. 1998) as it continues to do in its petition, even though *Jolly* was decided on other grounds. *Infra*, at 11.

More important is what Petitioner did not argue. ***At no point in response to the plaintiff's tolling argument did Petitioner claim that its defense was in any way impaired by delay, that its constitutional right to due process was implicated, or that the issue should be resolved on the basis of any federal law.*** (10/1/09 Reply) Nor did it do so when the motion was orally argued. (Trans., 135-140) Therefore, there was no discussion of how, if at all, Petitioner's defense had been impaired by delay. And no evidence suggests that it was.

The state district court held that no new evidence had been presented which justified departure from its previous order denying Petitioner's motion for summary judgment. (10/18/09 Order, 6)

Petitioner had a third opportunity to make its due process argument in the state trial court when jury instructions were settled. The Respondent objected to Petitioner's proposed jury instructions related to the statute of limitation issue based on her contention that it was a legal issue to be decided by the court. (Trans., 1783) She specifically relied on putative class action tolling as part of her objection to the instructions (Trans., 1783), however, Petitioner made no response to that argument and, once again, did not suggest that its ability to defend itself had been in any way impaired, that its right to due process was at issue, or that any other federal law was implicated. (Trans., 1784-1785)

Petitioner filed a post-trial motion for judgment as a matter of law which again argued the statute of limitation but which raised no federal issue and did not mention its right to due process. (11/4/09 Mtn., 2-6 and 12/7/09 Reply, 5-6)

This extensive discussion of the procedural history is necessary for two reasons. First, the trial court was never given an opportunity to consider whether, in fact, evidence or testimony was lost due to delay because it was never alleged. Second, in Montana, as in most jurisdictions, an objection or claim cannot be raised on appeal unless first asserted in the trial court. *In re T.E.*, 2002 MT 195, ¶¶20-21, 311 Mont. 148, 54 P.3d 38; *State v. Benson*, 1999 MT 324, ¶19, 297 Mont. 321, 992 P.2d 831. The Montana Supreme Court has held that it would be unfair to fault a trial court for something it was not given an opportunity to consider. *Stanton v. Wells Fargo Bank Mont., N.A.*, 2007 MT 22, ¶35, 335 Mont. 384, 152 P.3d 115.

Accordingly, Petitioner did not raise a federal issue, not to mention denial of due process, on appeal to the Montana Supreme Court. Attached as App. 1-25 are its table of contents, list of authorities, statement of the issues, and the entirety of its statute of limitation argument from its opening brief to the Court. They demonstrate that a federal issue is not raised and the Fourteenth Amendment of the United States Constitution is not even cited in the Table of Authorities. In fact, Petitioner did not raise the tolling issue at all in its opening brief

on appeal. It waited to address the issue until its reply brief to which Respondent had no opportunity to respond. In Montana, new issues cannot be raised in a reply brief. *Kulstad v. Maniaci*, 2010 MT 248, ¶22, 358 Mont. 230, 744 P.3d 722.

However, even in the reply brief, its current argument that tolling based on a personal injury class action precludes preserving evidence in violation of basic due process guarantees is nowhere to be found. The only mention of the Fourteenth Amendment in its Table of Authorities cited to p. 18 which related to its duty to warn and had nothing to do with the tolling issue.

Petitioner contended in post-appeal arguments to the district court that it raised a due process issue in its reply brief when it cited *Gibson v. Am. Cyanamid Co.*, No. 07-C-864, 719 F. Supp. 2d 1031, 2010 WL 2465498, at *2 (E.D. Wis. June 15, 2010) for its suggestion that because the state in which the *Becker* class action was pending (federal district court in Tennessee) did not recognize cross-jurisdictional tolling, due process would be implicated if Montana treated the class action differently. However, even there, Petitioner made no argument that tolling based on a personal injury class action precludes defendants from preserving evidence in violation of basic due process guarantees. Nor did *Gibson* have anything to do with class action tolling. It simply addressed retroactive imposition of substantive liability on a party based on the risk contribution rule, even though the party had no proven connection to the cause of the

plaintiff's injuries and that case had no evident connection to any issue in this case.

For these reasons, a review of the Montana Supreme Court's opinion in this case will reveal no discussion of the Fourteenth Amendment, due process, or any other federal rule of law. It simply cited reasoning from non-binding federal decisional law which includes no discussion of due process.

Ms. Stevens argued that Petitioner's entire tolling argument was improperly raised for the first time in its reply brief and moved that the entire portion of the reply brief be stricken or in the alternative that oral argument be scheduled so that a full response could be made. The Supreme Court granted oral argument – a rare occurrence in Montana. ***At no time during oral argument was due process mentioned by Petitioner.*** Its new due process argument is a complete afterthought.

Nor do any of the conflicting authorities cited by Petitioner from other jurisdictions discuss a statute of limitation or tolling as implicating due process and the Fourteenth Amendment or any other federal law.

D. Applicable State Law

Although they did not raise a federal issue, Petitioner made a number of similar policy arguments in its reply brief to those made in its petition. It argued that "most states that have considered the concept (cross jurisdictional tolling) have rejected it." That

argument was incorrect. Appellate courts in eight states had considered and decided the issue, four had allowed cross-jurisdictional tolling. *See Staub v. Eastman Kodak Co.*, 726 A.2d 955, 967, n. 4 (N.J. Super. Ct. App. Div. 1999); *Vaccariello v. Smith & Nephew Richards, Inc.*, 763 N.E.2d 160, 163 (Ohio 2002); *Lee v. Grand Rapids Board of Education*, 384 N.W.2d 165, 168 (Mich. App. 1986); and *Hyatt Corp. v. Occidental Fire & Cas. Co.*, 801 S.W.2d 382 (Mo. Ct. App. 1990).[4]

Courts in four states had rejected cross-jurisdictional tolling. *See Portwood v. Ford Motor Co.*, 701 N.E.2d 1102, 1105 (Ill. 1998); *Ravitch v. Pricewaterhouse*, 793 A.2d 939 (Pa. Super. 2002); *Maestas v. Sofamor Danek Group, Inc.*, 33 S.W.3d 805 (Tenn. 2000); and *Bell v. Showa Denko K.K.*, 899 S.W.2d 749 (Tex. App. 1995).[5]

The remainder of the 41 cases cited by Petitioner fall into one of several categories. Some are federal court decisions where the court declined to apply cross-jurisdictional tolling in a diversity action because there were no prior decisions in the states where the cause of action arose one way or the other and the federal court declined to decide the issue for the state. *See, e.g., Bozeman v. Lucent Technologies,*

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[4] As noted, none of these cases were based on an issue of federal law.

[5] Neither were any of these cases decided based on an issue of federal law. All eight cases were decided as a matter of state tolling policy.

Inc., No. 2:05 CV 45 A, 2005 WL 2145911, at *3 (M.D. Ala. Aug. 31, 2005).

In a number of cases cited by Petitioner, the court refused to toll the statute of limitation for reasons unrelated to the issue of cross-jurisdictional tolling. *See, e.g., Love v. Wyeth*, 569 F. Supp. 2d 1228, 1236 (N.D. Ala. 2008) (national class action was "facially spurious.")

Other cited cases simply applied those four cases in which Respondent acknowledges that cross-jurisdictional tolling has been rejected to cases arising in the four states in which it has been rejected. *See, e.g., In re Vioxx Products Liability Litigation*, 522 F. Supp. 2d 799, 815 (E.D. La. 2007).

Petitioner also argued before the Montana Supreme Court as it does in its petition that California rejected class action tolling in *Jolly v. Eli Lilly & Co.*, *supra*, in all actions involving mass torts. However, the court in *Jolly* held that the class action in that case, which sought only monitoring, did not toll the statute of limitation in the individual plaintiff's personal injury action because the defendant would not have been on notice of an entirely different claim based on the class action. (*Jolly*, 751 P.2d at 937) The court pointedly did not address whether any personal injury mass tort filing could serve to toll a statute of limitation for putative class members after certification is denied for lack of commonality. (751 P.2d at 937) On the other hand, other courts which have addressed the issue, e.g., *Hyatt Corp. v. Occidental Fire*

& Cas. Co., 801 S.W.2d 382, 384 (Mo. Ct. App. 1990); *Staub v. Eastman Kodak Co.*, 726 A.2d 955 (N.J. Super. Ct. App. Div. 1999); and *Vaccariello*, *supra*, were all mass tort cases in which tolling was applied in each of the respective states.

Most importantly for purposes of this court's jurisdiction, ***none of the nine states, now including Montana, which have directly decided the issue of cross-jurisdictional tolling based on class actions, including those which have based their decision on class actions for personal injury torts, have based their decision on any federal law or even discussed the potential application of due process protections***.

E. The Montana Supreme Court Opinion Does Not Support Certiorari

In a well reasoned and analytical opinion, the Montana Supreme Court in *Stevens v. Novartis Pharmaceuticals Corporation*, 2010 MT 282, 358 Mont. 474, 247 P.3d 244 (Pet. App., 1a-55a) held that Petitioner had been fairly notified of the claims being made against it by the *Becker* class action filed in Tennessee, that no prejudice had been demonstrated by the ten-month delay it alleged had occurred before it was added as a defendant in this case, and that, therefore, based on the facts presented in this case, the Montana statute of limitation had been tolled for the period of time during which the *Becker* action was

pending and Respondent's action was not barred by Montana's statute of limitation.

The Montana Supreme Court noted in response to Petitioner's statute of limitation argument, that both the fictitious defendant statute and tolling had been raised as issues. (Pet. App., 10a-11a) It held that the district court would be affirmed if Petitioner was properly substituted as a fictitious defendant or that limitations had been tolled during the pendency of the *Becker* class action, but after careful consideration of the arguments raised, chose to decide the case based on tolling and, therefore, did not reach the fictitious defendant issue. (Pet. App., 12a)

The Montana Supreme Court could have decided this case on an alternate basis had a persuasive argument been made that federal law, including the Fourteenth Amendment, was implicated by tolling. However, that argument was never raised and never considered.

In its analysis of class action tolling, the Supreme Court discussed *American Pipe*, *supra* (Pet. App., 12a-15a) and Petitioner's contentions that mass torts were generally unsuited to affect class action tolling and that the better reasoned authorities reject cross-jurisdictional tolling. (Pet. App., 15a-16a)

In response to its claims that it had not been afforded proper notice, the Court stated that:

> While we may later encounter a situation in which a class action suit does not afford

> sufficient notice to the defendants of subsequent plaintiff's claims, we do not believe we are faced with such an instance today. Novartis' alleged failure to warn, and the injury caused as a result, serve as the underpinning for both the class action suit and Stevens' claim, and the warnings issued by Novartis to healthcare professionals around the country were presumably the same or substantially similar.
>
> . . . We are not convinced that the nature of the individual plaintiff's claims in *American Pipe* and its progeny were of substantially greater variance than the nature of the plaintiff's claims in the *Becker* class action. Under modern pleading rules, Novartis is only entitled to be noticed of the nature of the claim, rather than the damages alleged, which need not be pleaded specifically. The argument that mass torts are unsuited for class action tolling seems to afford too little weight to the critical distinction between variance in damages and variance in the nature of the claims. We are unpersuaded that mass torts are unsuitable for class action tolling. We conclude that Novartis was effectively put on notice of Stevens' claim by the *Becker* suit, and allowing class action tolling in this context would not unfairly prejudice Novartis for lack of notice.
>
> (Pet. App., 17a-18a)

With regard to Petitioner's claim that tolling should not apply cross jurisdictionally, the Court

noted that its characterization of what other courts have done was exaggerated because,

> . . . in reality the doctrine has seldom been squarely addressed, and it is clear that its outlines are still in the process of developing. Many of the cases Novartis cites as "rejecting" the doctrine, for example, are merely circuit court decisions looking to existing state law, finding no authority one way or the other, and declining to decide the issue without guidance from the state's highest court. (citation omitted) . . . (Pet. App., 19a)

The Montana Supreme Court then went through an assiduous nationwide analysis of decisional law on the issue (Pet. App., 19a-22a) before noting that Respondent's claim was filed only ten months after the alleged expiration of the limitations, in stark contrast to the drastic scenarios forecast by Petitioner and courts from other jurisdictions (Pet. App., 22a), and that decisions adopting cross-jurisdictional tolling had more effectively balanced the considerations at issue. (Pet. App., 22a)

Finally, the Court observed in response to similar doomsday predictions by Petitioner that, " . . . the best judge of these competing arguments will be experience." (Pet. App., 25a) And, most importantly for purposes of the argument currently being made by Petitioner, held that:

> We recognize that in some instances a class action suit may *not* fairly put the defendants on notice. **Our adoption of the rule is**

> **therefore limited to situations in which defendants are fairly put on notice of the substantive claims against them.** Were we confronted with a case such as that faced by the California Supreme Court in *Jolly*, where the individual claim sought damages for personal injuries but the class action suit sought only monitoring, we would likely not see fit to extend the doctrine. (citation omitted) Similarly, the present case involved an alleged limitations failure of under a year. Were we to confront a situation such as the one faced by the *Portwood* court – where the class action suit was alleged to have tolled the statute of limitations for over a decade – we might find the principles of notice in fairness to defendants not met and the doctrine inapplicable. **Thus, before tolling the statute of limitations during the pendency of a class action suit, we must examine the circumstances present in the case to ensure that defendants are not unfairly prejudiced, regardless of the jurisdiction in which the actions are filed.** On the facts before us today, we conclude that tolling our state statute of limitations best upholds the competing policies at issue. (Pet. App., 26a-27a) (emphasis added)

Nowhere did the Montana Supreme Court opinion related to that state's statute of limitation address the due process clause of the Fourteenth Amendment to the U.S. Constitution or any other federal issue and, based on the highlighted language, the opinion can never implicate the

right to due process because it only applies when a defendant has adequate notice of the claim against it.

In a thoughtful opinion, the Court carefully accounted for all the onerous scenarios and potentially unfair outcomes that are forecast by Petitioner by holding that if those circumstances are ever presented to the Court, it reserves the right to come to a different conclusion. Its decision was simply a common sense application of the law based on the facts in this case.

ARGUMENT

I.

In The State Court Proceedings, Petitioner Did Not Raise A Constitutional Challenge To Cross-Jurisdictional Tolling Nor Establish Any Factual Record On Which To Consider It. It Cannot Raise That Issue For The First Time By Petition To This Court.

Supreme Court Rule 14(1)(g)(i) of this Court requires, when review is sought of a state court judgment, that a petition specify,

> . . . the stage in the proceedings both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions

> of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . so as to show that the federal question was timely and properly raised and that this court has jurisdiction to review the judgment on a writ of certiorari. . . .

Supreme Court Rule 14(1)(i)(v) requires that the part of the record necessary to demonstrate when and how the federal issue was raised be included in the petition's appendix.

Petitioner has not complied with either requirement because it did not raise a federal question in either state district court or on appeal to the state supreme court. This alone requires denial of its petition.

Petitioner states on p. 7 of its petition that the court did not address its argument that application of class action tolling here would violate due process. That's because it didn't make that argument. Nor did it ever assert much less establish that because the action was tolled for ten months, it was precluded from "timely preservation of evidence and testimony critical to presenting an effective defense," which it contends on p. (i) is now the issue which this court should address. In fact, all of plaintiff's medical records and financial data were completely preserved, discovery by co-defendants was ongoing for a year prior to Petitioner's involvement, no witness had become unavailable, and Novartis was given the opportunity to duplicate any discovery which it felt

had not been adequately completed, an opportunity of which it availed itself in excess.

With "very rare exceptions," *Adams v. Robertson*, 520 U.S. 83, 86 (1997) quoting *Yee v. Escondido*, 503 U.S. 519, 533 (1992), this Court adheres to the rule in reviewing state court judgments under 28 U.S.C. §1257(a), that it will not consider a Petitioner's federal claim unless it was either addressed by or properly presented to the state court that rendered the decision it has been asked to review. *Id.* As in *Adams*, the State's highest appellate court has not expressly addressed the constitutional question raised by Petitioner here to justify the grant of a writ of certiorari.

This rule protects the interest of comity between the state courts and the Supreme Court. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988). In *Adams*, this Court explained that:

> "[I]t would be unseemly in our dual system of government" to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider. *Webb*, 451 U.S. at 500 . . . Thus, the rule affords state courts "an opportunity to consider the constitutionality of the actions of state officials, and, equally important, proposed changes" that could obviate any challenges to state action in federal court. *Illinois v. Gates*, 462 U.S. 213, 221-222 (1983).

520 U.S. at 91.

Moreover, when the highest state court is silent on a federal question now presented to this Court, this Court rightly assumes that the federal issue was not properly presented to the state court. *Adams*, 520 U.S. at 86-87, citing *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987). The aggrieved party bears the burden of overcoming this assumption by demonstrating that the state court had an opportunity to address the federal question now presented by Petitioner to this Court. *Board of Directors*, *supra*. *Webb v. Webb*, 451 U.S. 493, 501 (1981).

Petitioner states that its constitutional right to due process is implicated by its inability to timely preserve evidence and testimony critical to an effective defense. Because it did not make that argument in state court and presented no examples in state court of how its defense was impaired, even though repeatedly given the opportunity to do so, this court's consideration of the argument would be based on mere speculation and abstract possibilities which have already been ruled out by the plain language of the Montana Supreme Court decision.

What Petitioner seeks is clearly what this Court has stated it will not give – an advisory opinion. For these very reasons, its constitutional argument has been waived and this case does not warrant review by this court.

II.

The State Court Judgment Rests Solely On Independent State Court Grounds And Presents No Federal Issue For Review.

This Court "from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945). This Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." *Id.* at 125-26. Thus, jurisdiction before the Court is presumed to exist only if it is not clear that the state court relied on independent and adequate state grounds, and when it fairly appears that the state court rested its decision primarily on federal law. *See Michigan v. Long*, 463 U.S. 1032, 1042 (1983). Even a cursory review of the opinion of the Montana Supreme Court reveals that *none* of its reasoning can possibly be categorized as resting primarily on federal law.

This Court has placed parameters on those cases over which it will exercise jurisdiction by writ of certiorari to a state's highest court in Rule 10. There it states that:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following although neither controlling nor fully measuring the court's discretion, indicate the character of the reasons the court considers:

> a) . . .
>
> b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals;
>
> c) a state court or United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

The Montana Supreme Court did not decide a question of federal law. Neither have those states which have rejected cross-jurisdictional tolling done so based on a question of federal law. Therefore, there is no issue of federal law that can be "settled by this court."

This Court has always held that statutes of limitation applicable to state causes of action as well as the law for tolling time periods are issues of state – not federal law. *See, e.g., Wallace v. Kato*, 549 U.S. 384, 394 (2007). *See also*, *Hardin v. Straub*, 490 U.S. 536, 542-43 (1989) (holding that lower federal courts should have applied a Michigan statute that suspended the limitations period for prisoners under disability in a civil rights action); *Great Western Tel. Co. v. Purdy*, 162 U.S. 329, 339 (1896) ("[t]he limitation of actions

is governed by the lex fori, and is controlled by the legislation of the State in which the action is brought, as construed by the highest court of that State, even if the legislative act or the judicial construction differs from that prevailing in other jurisdictions . . . [t]he question at what time the cause of action accrued in this case, within the meaning of the statute of limitation of Iowa, was not a Federal question, but a local question, upon which the judgment of the highest court of the State cannot be reviewed by this court"); *N. Star Steel Co. v. Thomas*, 515 U.S. 29, 35 (1995) (Court looks to state law to supply a statute of limitation for a missing federal limitations period).

In *Board of Regents v. Tomanio*, 446 U.S. 478, 484-86 (1980), the Court reviewed the contention that a 42 U.S.C. §1983 action was barred by New York's 3-year limitations statute. The District Court and the Court of Appeals had rejected the defense by relying on a "federal tolling rule" not contained among the tolling provisions the state legislature had codified with its limitations periods. *Tomanio*, 446 U.S. at 482, 486. The Court reversed, holding that limitations periods in §1983 suits are to be determined by reference to the appropriate "state statute of limitations and the coordinate tolling rules." *Tomanio*, 446 U.S. at 484. New York's legislative choices in this regard were therefore "binding rules of law." *Tomanio*, 446 U.S. at 484. Since the State's rules did not defeat either §1983's chief goals of compensation and deterrence or its subsidiary goals of uniformity and federalism, the

Court held that Tomanio's suit was time barred. *Tomanio*, 446 U.S. at 488-92.

In *Olympia Mining & Milling Co. v. Kerns*, 236 U.S. 211 (1915), the Court refused to hear plaintiff's argument that the Idaho Supreme Court's decision that the statute of limitation barred a company's action against a property owner to enforce a trust agreement adversely affected its due process rights because no federal question was raised or even remotely suggested to the lower court.

The result in this case can be no different. Because statutes of limitation for state causes of action are issues of state law, the circumstances under which those statutes are tolled present an issue of state law. That is all that was decided by the Montana Supreme Court. Therefore, no federal question has been presented and Petitioner has not shown a jurisdictional basis for its petition.

III.

Petitioner Has Not Presented Any Authority To Support Its Argument That Montana's Statute Of Limitation Or Circumstances For Tolling That Statute Gave Rise To A Violation Of Due Process.

Nowhere in its petition does it describe the rights guaranteed by due process or how it has been denied those rights when it was substituted as a party to timely-filed litigation.

The requirements for procedural due process are reasonable notice and an opportunity for a hearing appropriate to the nature of the case. *See Jones v. Flowers*, 547 U.S. 220, 226-27 (2006) and *Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972). Procedural due process is a "guarantee of fair procedure." *Zinermon v. Burch*, 494 U.S. 113 (1990); *see also, Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (due process is a "flexible" concept calling only "for such procedural protections as the particular situation demands").

Since there is no allegation of arbitrary governmental authority which would implicate substantive due process rights, Petitioner is presumably complaining that under some circumstance that could occur in the future, but has not been demonstrated in this case, cross-jurisdictional tolling based on a tort class action could result in denial of procedural due process. However, if that hypothetical situation could occur, there has been no demonstration that it occurred in this case, nor could it ever occur in Montana based on the plain language of the Montana Supreme Court decision.

Petitioner had reasonable notice of the allegations against it, an opportunity to investigate through extensive discovery the merits of those claims, and a week-and-a-half long trial at which to defend itself based on the facts that it discovered.

All that Petitioner contends is that because it wasn't joined in this action for three years and ten

months after Peggy Stevens discovered the nature of her injury, it was treated unfairly. However, the result would have been the same under Montana's tolling statute. *See* §27-2-102(3), MCA (if the facts are concealed or self-concealing, a "period of limitation does not begin on any claim or cause of action for an injury to person or property until the facts constituting the claim have been discovered or, in the exercise of due diligence, should have been discovered by the injured party"). The result would have been the same based on the interpretation of Montana's fictitious defendant statute, §25-5-103, MCA, by the California Supreme Court and the state district court in this case. And, actual notice to Novartis of this individual claim could have been postponed even further had plaintiff chosen to avail herself of the right pursuant to Rule 4(E), M.R.Civ.P. to serve her complaint and summons at any time within three years from commencement of a timely action.

Petitioner's contention that it was denied due process by being joined in this action ten months beyond the period of three years ignores the fact that in other jurisdictions, it could have been named in an action months or years later.

Other states have longer statutes of limitation for personal injury actions. Florida, Nebraska, Utah and Wyoming have four year periods: Fla. Stat. §95.11(3); Neb. Rev. Stat. §25-207; Utah Code Ann. §78-12-25; Wyo. Stat. §1-3-105. Missouri has five years. Mo. Rev. Stat. §516.120(4). Maine and North Dakota have six years. Me. Rev. Stat. Ann. tit. 14,

§752; N.D. Cent. Code §28-01-16. Does Petitioner contend that its ability to defend is impaired as a matter of law in each of these states?

Petitioner has given no examples of cases in which a defendant has successfully challenged a statute of limitation on constitutional grounds because of its length or because it was tolled. However, in *Wesley Theological Seminary v. United States Gypsum Co.*, 876 F.2d 119, 122-23 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990), the court rejected a defendant's argument that the statute of repose – amended by the legislature while the case was pending so that defendant was denied its benefit, violated its due process rights because the statute served a rational legislative purpose.

Even when statutes of limitation have been arbitrary in their denial of relief to an injured party, courts have found no due process implications. *See, e.g., Douglas v. Hugh A. Stallings, M.D., Inc.*, 870 F.2d 1242, 1249-50 (7th Cir. 1989) ("a tolling statute, like any procedural rule, cannot vest plaintiffs with a substantive right in the continued protection of that rule . . . [i]t is the province of the Indiana legislature to allocate the increased cost of health care between the health care providers, insurance carriers and patients and to determine under what circumstances it is appropriate to delay the running of the statute of limitation in spite of the increased risk of lost evidence and lapse of memory. The state need not provide a tolling provision for minority and mental incompetence or a discovery rule in order to comply

with the due process guarantees of a meaningful opportunity to be heard"); *Jewson v. Mayo Clinic*, 691 F.2d 405, 411-12 (8th Cir. 1982) ("[i]f the limitation period is otherwise reasonable, a claimant is not thereby deprived of his right to due process . . . [t]he statute of limitations as applied did not violate Jewson's due process rights").

In other words, procedural rules do not normally vest a party with substantive rights, especially where as in this case, Petitioner cannot show unfair prejudice as a result of the application of that rule. In order to invoke the Fourteenth Amendment's Due Process Clause, Petitioner must show that it's been denied life, liberty, or property without adequate procedural protection. *See Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). It has made no showing that any loss that it has sustained resulted from the point at which it was added to this lawsuit rather than the merits of the claim against it and, therefore, it has not met that burden.

In *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983), the Court determined that state court judgments clearly based on adequate and independent state law grounds are generally immune from Supreme Court review – "[r]espect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground"). There has been no reason shown to depart from that principle here.

IV.

Misstatements Of Fact Or Law Found In Petitioner's Petition.

On p. 9 of its brief, Petitioner cites *In re Rezulin Prod. Liab. Litig.*, M.D.L. 1348, 2005 WL 26867, *3 (S.D.N.Y. January 5, 2005) for the argument that federal due process requires some limitation on the application of class action tolling. However, due process is not discussed in that case. That court simply stated "[i]n the absence of any suggestion that the New Mexico Supreme Court would adopt the *American Pipe* rule in these circumstances, this Court declines to do so." *In re Rezulin Prod. Liab. Litig.*, 2005 WL 26867, *3 (S.D.N.Y. 2005). Montana has followed the reasoning of *American Pipe* and *In re Rezulin* is therefore inapposite.

Nor does the Lowenthall and Feder law review article cited by Petitioner on pp. 8 and 12 of its petition discuss tolling in terms of due process as is suggested by Petitioner. The article does not mention due process. The article does state, however, that "state courts should recognize that whether the filing of a class action, in state or federal court, should toll a state limitations period is exclusively a matter of state law." Mitchell A. Lowenthall and Norman Menachem Feder, *The Impropriety of Class Action Tolling From Mass Tort Statutes of Limitations*, 64 Geo. Wash. L. Rev. 532, 568 (1996). In other words, it supports the view that certiorari is inappropriate in this case. Nor does the partisan article represent a unanimous view

regarding the advisability of class action tolling as a matter of public policy.[6]

Nor do any of the cases cited on pp. 21-24 of the petition discuss, as implied by Petitioner, the due process clause in the context of tolling a statute of limitation.[7]

On the other hand, in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 316 (1945), the Court held that retroactive application of a statute of limitation did not violate the Due Process Clause of the Fourteenth Amendment. It held that the appellant securities corporation was not adversely impacted by the retroactive application of the limitation period – "certainly it cannot be said that lifting the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time is per se an offense against the Fourteenth Amendment." *Chase Securities Corp.*

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[6] Andrew Burnett, *Recent Development: Philip Morris USA, Inc. v Christensen: A Class Action Claim Can Toll the Statute of Limitations for Individual, Unnamed Members of the Class as Long as the Defendant is Provided with Sufficient Notice*, 37 U. Balt. L.F. 76, 79 (Fall 2006) (noting that the court in *Christensen* "stated there is no reason to have a per se exception for mass-tort cases").

[7] *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *Pennoyer v. Neff*, 95 U.S. 714 (1877); *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272 (1855); *Ortiz v. Fibreboard Corporation*, 527 U.S. 815 (1999); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *Philip Morris USA, Inc. v. Scott*, ___ U.S. ___, 131 S. Ct. 1, 177 L. Ed. 2d 1040 (2010) do not discuss tolling a statute of limitation.

v. Donaldson, 325 U.S. at 316. Statutes of limitation "are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay." *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314, 89 L. Ed. 1628, 65 S. Ct. 1137 (1945). *See also*, *Campbell v. Holt*, 115 U.S. 620 (1885) (no due process violation where repeal of a pre-Civil War statute of limitation and its continued postwar suspension prevented it from barring a devisee's action against estate administrators to collect a decedent's debt). The *Chase* Court noted that *Campbell* established "that statutes of limitation go to matters of remedy, not to destruction of fundamental rights." *Chase*, 325 U.S. at 314.

On p. 7 of its petition, Petitioner contends that "suspending statutes of limitation indefinitely" for personal injury plaintiffs based on a federal class action introduces systemic unfairness to the defendant. Class actions need not suspend statutes of limitation indefinitely. The defendant has, at all times, the power to bring the class certification issue to resolution.

"[N]othing in the plain language of Rule 23(c)(1)(A) either vests plaintiffs with the exclusive right to put the class certification issue before the district court or prohibits a defendant from seeking early resolution of the class certification question. The only requirement is that the certification question be resolved '[a]t an early practicable time.'" *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 939-941 (9th Cir. 2009) (holding that a defendant may move to deny class

certification before a plaintiff files a motion to certify – "[t]he plain language of Rule 23(c)(1)(A) alone defeats Plaintiffs' argument that there is some sort of 'per se rule' that precludes defense motions to deny certification, and Plaintiffs have produced no authority to the contrary").

See also, *Jimenez v. Allstate Indem. Co.*, 2010 U.S. Dist. LEXIS 95993 (E.D. Mich. Sept. 15, 2010) ("nothing in Rule 23 prevents a defendant from attempting to preemptively deny certification on the grounds that the prerequisites of Rule 23(a) and (b) can never be satisfied . . . Allstate is permitted to raise certification issues at this stage in the litigation. Allstate's motion is not procedurally improper"); *Fedotov v. Peter T. Roach & Assocs., P.C.*, 354 F. Supp. 2d 471, 478 (S.D.N.Y. 2005) ("'The defendant need not wait for the plaintiff to act, however. The defendant may move for an order denying class certification'") (quoting 5-23 Moore's Federal Practice 3d §23.82).

Nor was indefinite suspension permitted in this case. Petitioner, which had had knowledge of all liability issues raised and had been defending against them for nearly a decade, was added to this individual action ten months after it contends the statute of limitation expired. The same result could have occurred for a number of other legal reasons. The court simply held that based on the specific facts of this case, absent any demonstration that Petitioner had been prejudiced by the delay, no "systemic unfairness" had been shown.

On p. 8, Petitioner contends that no pharmaceutical personal injury class "has been certified over opposition and survived appeal in the federal system since *Ortiz v. Fibreboard Corporation*, 527 U.S. 815 (1999) and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997)." It cites *Jolly v. Eli Lilly & Co.*, *supra*, as an example. First, Petitioner's statement includes so many qualifying facts that it's hard to judge its relevance. Second, neither *Ortiz* nor *Amchem* prohibit class actions for personal injuries. Both cases were limited to the facts of those cases and held that the classes failed for obvious intraclass conflicts. Furthermore, as previously noted, *Jolly* was not decided on the basis that Petitioner repeatedly suggests, as is noted in the Montana Court's opinion (Pet. App., 21a, fn. 3). *Jolly* was based on that court's conclusion that a class action for monitoring did not give the defendants sufficient notice of an individual personal injury claim to warrant tolling. That is not the issue in this case. Petitioner consistently cites *dicta* from *Jolly* as if it was the basis for the court's decision.

On p. 9 and again on pp. 19-20, Petitioner seems to suggest that because plaintiffs in the *Becker* class action did not ultimately move to certify the personal injury aspect of the case, it could not have served as a basis for tolling. However, this court has never required actual certification for tolling because it is the complaint itself which puts the defendant on notice of the issues and the evidence that it need preserve and because as previously noted, the defendant can at any

time terminate the tolling period by simply moving to deny certification.

See Sawyer v. Atlas Heating & Sheet Metal Works, Inc., 2010 U.S. Dist. LEXIS 82196, 6-7 (E.D. Wis. Aug. 11, 2010), (permitting tolling in a subsequent class action during the period that a prior class action complaint was pending even though the plaintiffs' voluntarily dismissed the prior action before seeking certification). The court explained that doing otherwise would defeat the rationale of *American Pipe*.

In accord are *Howard v. Gutierrez*, 474 F. Supp. 2d 41, 45-52 (D.D.C. 2007), and *In re Hanford Nuclear Reservation Litigation*, 534 F.3d 986, 1009 (9th Cir. 2008).

On p. 10 of its petition, Petitioner suggests that the Montana Supreme Court felt the result in this case was required by *American Pipe & Constr. Co.*, and that, therefore, this court's intervention is necessary. However, the Montana Supreme Court did just the opposite as is clear from its opinion where it characterized the case as instructive but of little guidance on the parameters of tolling and noted it only applies to federal courts while states are free to adopt their own tolling rules. (Pet. App., 15a). The court simply agreed with this court's reasoning in *American Pipe* and saw no reason not to extend that reasoning to the facts in this case. It was free to do so as a matter of state policy. The fact that it agreed with the reasoning in *American Pipe* did not give rise

to a federal issue or federal jurisdiction over its decision.

On pp. 14-21, Petitioner contends that federal and state court decisions diverge sharply on the appropriate application of *American Pipe* class action tolling and that, therefore, this court must intervene to establish a national standard. However, that invitation to intervention incorrectly assumes there is a federal basis on which the courts diverge. None of the nine cases, previously cited, in which this issue has been directly decided by individual states was based on federal law or involved a due process issue. Furthermore, arbitrarily imposing a federal standard on all jurisdictions just for the sake of uniformity would fly in the face of this court's position that the states act as individual laboratories for the purpose of "crafting appropriate procedures."

In *Smith v. Robbins*, 528 U.S. 259, 275 (2000), Justice Thomas stated the following, in the context of criminal procedure:

> In short, it is more in keeping with our status as a court, and particularly with our status as a court in a federal system, to avoid imposing a single solution on the States from the top down. We should, and do, evaluate state procedures one at a time, as they come before us, *see Murray*, *supra*, at 14, while leaving "the more challenging task of crafting appropriate procedures . . . to the laboratory of the States in the first instance."

> *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 292, 111 L. Ed. 2d 224, 110 S. Ct. 2841 (1990) (O'CONNOR, J., concurring) (citation and internal quotation marks omitted). We will not cavalierly "impede the States' ability to serve as laboratories for testing solutions to novel legal problems." *Arizona v. Evans*, 514 U.S. 1, 24, 131 L. Ed. 2d 34, 115 S. Ct. 1185 (1995) (GINSBURG, J., dissenting).

See also Justice Kennedy's concurring opinion 514 U.S. at 581, and Justice Scalia's dissent in *Youngblood v. West Virginia*, 547 U.S. 867, 874 (2006) (citation omitted), joined by Justice Thomas: "[i]n vacating the judgment of a state court for no better reason than our own convenience, we not only fail to observe, but positively flout the 'special deference owed to . . . state courts.'"

On p. 16, Petitioner contends that other than Montana, only New Jersey has allowed tolling based on a personal injury class action. While that fact would not be relevant to whether there is a federal issue, neither is correct. *Hyatt Corp. v. Occidental Fire & Cas. Co.*, 801 S.W. 2d (Mo. Ct. App. 1990) and *Vaccariello v. Smith & Nephew Richards, Inc.*, 763 N.E.2d 160 (Ohio 2002) are all courts which have applied cross-jurisdictional tolling in the mass tort context.

While Petitioner makes numerous public policy arguments for why a state should not adopt cross-jurisdictional tolling in mass tort class action cases, it

cites no decision in which that policy issue was resolved based on a due process or other constitutional basis. The policy arguments made on pp. 14-21 are clearly more properly made to the courts in the jurisdictions cited.

On p. 20 of its petition, Petitioner touts the decision of Judge Todd Campbell refusing to apply cross-jurisdictional tolling to an individual claim that arose in the state of Tennessee. Citing *In re Aredia and Zometa Prods. Liab. Litig. (Foster)*, No. 3:08-0932, 2010 WL 4977066 (M.D. Tenn. Dec. 7, 2010). Judge Campbell's decision adds nothing to the discussion. He simply applied Tennessee law to a case which arose in Tennessee as he was required to do pursuant to the authorities previously cited. The State of Tennessee has rejected cross-jurisdictional tolling as was also previously noted. *See Maestas v. Sofamor Danke Grp., Inc.*, 33 S.W. 3d 805 (Tenn. 2000). The Montana Supreme Court was well aware of the Tennessee decision (Pet. App., 20a) and chose not to follow it. Judge Campbell did not have that option.

Finally, on p. 24 of its petition, Petitioner cites *Dukes v. Wal-Mart*, 603 F.3d 571 (9th Cir.), *cert. granted*, 131 S.Ct. 795 (2010) as the doomsday scenario to which tort class action tolling could lead. However, to suggest that is even remotely possible is to ignore the plain language of the Montana Supreme Court decision which clearly limited its holding to the facts in this case and held that in the future, the issue would be decided on a case-by-case basis giving significant consideration to the adequacy of the notice

provided by the class action and the length of time to which a party claimed tolling should occur. *Dukes* has no relevance to this case.

CONCLUSION

Because the issue argued was not raised in the lower courts, because the case complained of did not decide a federal issue and is not in conflict with any other state's interpretation of a federal issue, because there has been no demonstration that Petitioner's right to due process has been compromised by the result in this case, and because accepting the petition would justify review of every state tort law issue, the petition should be denied.

Respectfully submitted,

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IN THE SUPREME COURT OF
THE STATE OF MONTANA
Case No. DA 10-0029

PEGGY STEVENS,
Plaintiff/Appellee.

vs.

NOVARTIS PHARMACEUTICALS CORPORATION,
Defendant/Appellant,

APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE FOURTH JUDICIAL
DISTRICT COURT MISSOULA COUNTY,
THE HONORABLE JOHN LARSON PRESIDING

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Statement of the Issues

1. In January 2008, Peggy Stevens filed suit against her oncologist, Dr. Schmidt, for failing to warn her of the risks of the drug Zometa®. Later – and after the statutory tort limitations period from the date of her injury – she amended her lawsuit to assert an identical claim against NPC. Montana's

fictitious name statute permits amendment of a complaint when the plaintiff "[did] not know the name of the defendant at the time the original complaint was filed." Stevens admits that she knew the identity of NPC long before filing the original complaint. Is Stevens' claim against NPC barred by the statute of limitations?

2. Montana follows the learned intermediary doctrine, which provides that a drug manufacturer's duty to warn extends only to the prescribing physician. Over NPC's objection, and based on a Restatement of Torts (Third) section that has never been adopted by Montana or any other jurisdiction, the trial court instructed the jury that NPC's duty extended to other treating healthcare providers. In closing argument, Stevens' counsel urged the jury to find NPC liable for failing to warn providers other than the prescribing physician. Was the instruction erroneous?

3. Stevens' original complaint against Dr. Schmidt, her amended complaint, her expert disclosures, and her discovery responses, all state facts inconsistent with NPC's liability for failure to warn, such as the fact that Dr. Schmidt was actually aware of the relevant risks of Zometa® at a time when a warning to Stevens would have prevented her injury. Stevens later settled with Dr. Schmidt. The trial court prevented NPC from cross-examining Stevens with this evidence or even from making the jury aware of the fact that Stevens had sued Dr. Schmidt. Was the exclusion of this evidence erroneous?

4. Dr. Schmidt was dismissed from the case on July 8, 2009, following a settlement, and Stevens responded to NPC's discovery request seeking information about the settlement on July 23, refusing to disclose anything. Twelve days later, NPC moved to amend its answer to add an apportionment defense. The trial court refused to permit NPC to amend its complaint on the ground that NPC did not act with "reasonable promptness." Was the trial court's refusal to permit amendment erroneous in light of the standard that leave to amend "shall be freely given when justice so requires"?

5. Stevens had dental surgery due to a broken tooth while she was on Zometa®. Her theory of causation was that the surgery triggered an adverse reaction to Zometa®, and that had she been warned, she would not have had the surgery. The uncontradicted evidence at trial established that Stevens had no choice about having some form of dental surgery to repair the broken tooth. Stevens offered no evidence that she had any surgical alternative that would have been less likely to trigger an adverse reaction to Zometa®. Did Stevens' failure to establish that an adequate warning would have prevented her injury require entry of judgment for NPC?

6. Stevens brought a Montana Medical-Legal Panel proceeding against her oral and maxillofacial surgeon, Dr. Morris, for failing to warn her of the risks of dental surgery while on Zometa®. Dr. Morris stated in his answer that the dental surgery that Stevens had due to her broken tooth was the only

realistic treatment option. When Dr. Morris contradicted this statement at trial by saying that there were other appropriate treatment options, NPC was prevented from impeaching him with his answer before the MMLP. Was the exclusion of Dr. Morris' statement erroneous?

7. Changes to pharmaceutical package inserts postdating the event that allegedly caused a plaintiff's injuries are subsequent remedial measures that are inadmissible under Montana Rule of Evidence 407. Joni Landes, a nurse employee of Dr. Schmidt's oncology practice, was permitted to testify at trial to a change to NPC's package insert for Zometa® that postdated the surgery that Stevens claims caused her injury. Was the admission of the Landes testimony erroneous?

* * *

Argument

I. Stevens' suit against NPC was filed more than three years after her injury and is thus barred by the statute of limitations.

A. Stevens did not sue NPC within the limitations period.

Stevens' claims against NPC should have been dismissed because they are barred by Montana's three-year statute of limitations, MCA § 27-2-204(1). Stevens first named NPC on January 13, 2009; it is entirely undisputed that she sued NPC almost four years after her physician diagnosed her with ONJ

and notified her of an alleged causal connection between Zometa® and ONJ.

In Montana, the statute of limitations on a personal-injury claim begins to run when a plaintiff discovers the cause of her alleged injuries. *See Bennett v. Dow Chem. Co.*, 220 Mont. 117, 121, 713 P.2d 992, 995 (1986) (affirming dismissal of plaintiff's untimely claims and holding that plaintiff cannot "utiliz[e] discovery doctrine to toll the statute of limitations beyond discovery of the cause of an injury"). A doctor's diagnosis and observations on cause satisfy the "discovery" requirement under Montana law. *Id.* (holding that the statute of limitations for plaintiff's claims began to run when plaintiff's doctor diagnosed his injuries and informed him of the suspected cause); *Nelson v. Nelson,* 2002 MT 151, ¶ 26, 310 Mont. 329, 50 P.3d 139 (statute of limitations began to run when plaintiff's physician associated her alleged injuries with exposure to certain chemicals and accidental vaccine injection). The three-year statute of limitations on Stevens' claim thus began to run in March of 2005 when Dr. Schmidt both diagnosed her with ONJ and attributed the cause to Zometa®. (*See* Tr. 754:12-25 (Stevens testifying that Dr. Schmidt told her in late 2004 or early 2005 that she may have ONJ due to Zometa®).) Stevens has conceded that her suit would be barred by the statute of limitations but for her interpretation of the fictitious name statute. (Tr. 1613:11-25 (Stevens' counsel acknowledging that judgment as a matter of law would be proper but for the fictitious name statute

because "Peggy Stevens knew the manufacturer of the drug that she was taking within three years of March 18, 2005" and because "[o]f course she knew that Zometa was manufactured by Novartis and she knew that she had osteonecrosis").)

Because Stevens did not assert any claims against NPC until January of 2009 – ten months after the statute of limitations on her injuries had expired – her claims against NPC are time-barred and should have been dismissed.

B. The clear language of the fictitious name statute precludes Stevens' untimely claims because she knew the identity of NPC prior to filing her original lawsuit.

1. Montana law does not permit the statute of limitations to be tolled while a plaintiff discovers the existence of her cause of action.

Stevens argued before the trial court that her untimely failure to warn claim against NPC was excused by Montana's fictitious name statute. The fictitious name statute establishes a procedure by which a plaintiff who "does not know the name" of a defendant when a complaint is filed may name them later:

> When the plaintiff **does not know the name of the defendant,** the defendant may be designated in any pleading or proceeding

> by any name. **When the defendant's true name is discovered,** the pleadings or proceedings may be amended accordingly.

MCA § 25-5-103.[3] In Montana, "It is well-established that when the language of a statute is clear and unambiguous, the statute speaks for itself. We will not 'insert what has been omitted . . . or omit what has been inserted' nor will we resort to other means of interpretation." *Kulstad v. Maniaci,* 2009 MT 403, ¶ 10, 353 Mont. 467, 221 P.3d 127 (quoting MCA § 1-2-101); *see also JTL Group, Inc. v. New Outlook, LLP,* 2010 MT 1, ¶ 36, 355 Mont. 1, 223 P.3d 912 ("We interpret statutes according to their plain language; if the language of the statute is clear on its face, this Court looks no further.").

Stevens admits that she in fact knew NPC's name when the original complaint was filed. (*See, e.g.*, Pl.'s Resp. Mot. Dismiss and/or Summ. J. on Stat. of Limits. 9 ("[P]rior to filing her [original] complaint, [s]he also knew that the drug which caused her injury had been manufactured by [NPC]").) Her action against NPC is therefore timely only if the fictitious name statute can be interpreted to permit a plaintiff to name a defendant late not only because she is ignorant of the defendant's *name,* but also because

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[3] "Plaintiff's knowledge about the defendant's true name [is determined] at the time of the filing of the original complaint." *Molina v. Panco Const., Inc.,* 2004 MT 198, ¶ 8, 322 Mont. 268, 95 P.3d 687 (holding that "plaintiff's ignorance of defendant's true name must be genuine and not feigned.").

she claims to be ignorant of "the nature of the defendant's culpability." *See id.* at 12. Stevens argued, and the trial court evidently accepted, that discovery of "the name of the defendant" in the statute should be read to include discovery of "the cause of action against the defendant."

Stevens' proposed rewriting of the fictitious name statute, in addition to violating Montana's canons of statutory interpretation, flatly contradicts Montana limitations law, which has long been clear that the statute of limitations is *not* to be extended to the discovery of a cause of action as opposed to the physical cause of an injury. The Supreme Court has in the past been invited to adopt discovery of the cause of action as a trigger for the running of the statute of limitations, and has "expressly decline[d] to extend discovery doctrine to toll statutes of limitation until discovery of legal rights." *Bennett v. Dow Chem. Co.*, 220 Mont. 117, 122, 713 P.2d 992, 995 (1986). In *Bennett*, the Supreme Court was faced with a pesticide applicator's assertion that he should have been allowed to file suit more than three years after his injury because he did not discover his cause of action until later. The Court noted that the appellant "is asking us to apply a 'discovery rule' by which the statute of limitations was tolled until the appellant 'discovered' his legal rights." *Id.* at 120, 713 P.2d at 994. The Court refused to do so, *id.* at 122, 713 P.2d at 995, and noted that "the *farthest reaches of [the] discovery doctrine in Montana*" were represented by a case in which the limitations period was tolled "until

the plaintiff discovered that his [injury] may have been caused by the drug." *Id.* at 121, 713 P.2d at 995 (emphasis added); *see also Sternhagen v. Dow Co.*, 711 F. Supp. 1027, 1030 (D. Mont. 1989) (recognizing that Montana law does *not* permit a plaintiff to toll the statute of limitations until she discovers her legal rights). This is in accordance with Montana statutory law as well. MCA § 27-2-102(2) ("Lack of knowledge of the claim or cause of action, or of its accrual, by the party to whom it has accrued does not postpone the beginning of the period of limitation.").

Stevens' interpretation of the fictitious name statute amounts to an assertion that a statute of limitations that *could not be tolled* under controlling law under other circumstances *can* be tolled under the guise of the fictitious name statute simply by naming a "John Doe" defendant whose identity is known to the plaintiff when the original lawsuit is filed. This interpretation violates both Montana's rules of statutory interpretation and the clear authority of Montana limitations law.

2. Montana law does not permit the statute of limitations to be tolled by the fictitious name statute when a plaintiff is aware of the identity of the defendant.

Even if it were legally permissible to invoke the fictitious name statute to justify a suit timed to the discovery of the cause of an injury, which it is not, the

tactic would be unavailable here, since no plausible case can be made that Stevens was ignorant of the facts that constituted her claim against NPC. *See Carl v. Chilcote*, 255 Mont. 526, 532 844 P.2d 79, 83 (1992) (statute of limitations begins to run when plaintiff is aware of "the facts constituting the claim . . . notwithstanding the fact that [the plaintiffs] may not have realized they had a possible claim against the City").

In this case, Stevens knew, before filing the original complaint against Dr. Schmidt and long before suing NPC:

- Zometa® was an NPC drug;[4]
- Zometa® allegedly caused ONJ in people undergoing invasive dental procedures;[5]
- There was information about the causal connection that she believed had not been provided to her prior to her tooth extraction;[6]

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[4] (Tr. 797:21-798:6 (Stevens testifying that she performed her own research in 2005 and from that research knew that Zometa® is an NPC drug).)

[5] (*See* Pl.'s Resp. Def.'s Third Disc. Req. 4 (listing articles gathered by Stevens in her literature search, including a September 2003 article by Dr. Robert Marx discussing the alleged association between tooth extractions and ONJ in Zometa patients).)

[6] Stevens admitted that she "knew prior to filing her Complaint that there was information available which explained the relationship [between Zometa® use and ONJ in individuals undergoing tooth extraction] and that it had not been provided

(Continued on following page)

- The contents of NPC's package insert for Zometa® prior to her extraction and injury;[7]
- The contents of a Dear Doctor letter sent out after her injury, warning doctors of the risks of ONJ which Stevens' attorney described at trial as "the first clear signal sent by Novartis to anybody that these extractions should be avoided."[8]

Indeed, it was based on this information that Stevens filed suit in January 2008 against Dr. Schmidt for failing to warn her of the risks of Zometa® – precisely the same claim that she later asserted against NPC. (*Compare* Compl. ¶¶ 16-18 *with* Am. Compl. ¶¶ 14-20.)

Montana law does not permit the fictitious name statute to be used to escape the ordinary operation of the statute of limitations under such circumstances. In *Franchi v. City of Helena*, No. BDV-04-262, 2005 Mont. Dist., LEXIS 529, at *5-6 (Mont. Dist. Ct. Mar. 16, 2005), for example, the court rejected application of the fictitious name statute and granted summary

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to her." (Pl.'s Resp. Mot. Dismiss and/or Summ. J. on Stat. of Limits. 10.)

[7] Stevens' *pre-filing* research revealed not only a Zometa® package insert, but the September 24, 2004 Dear Doctor letter as well. (*See* Pl.'s Resp. Def.'s Third Disc. Req. 4 (listing articles gathered by Stevens in her literature search, including the Dear Doctor letter which also enclosed a copy of the 2004 Zometa® package insert).)

[8] (*See id.* (Dear Doctor letter); Tr. 1675:17-19 (Stevens' attorney's comments).)

judgment based on the statute of limitations because plaintiff "[did] not even suggest that they were ignorant of the name of the Defendant," but rather "claim[ed] that they were ignorant of facts giving rise to the [defendant's] liability." The plaintiff, who was injured riding his bicycle in Helena, originally named several defendants, including several "John Does", but not the City of Helena. After the statute of limitations had run, plaintiff attempted to substitute the City of Helena for a John Doe defendant. The plaintiff knew the name of the defendant, but claimed to be unaware that the other defendants would blame the City for failing to enforce an ordinance. *Id.* The court correctly found that the fictitious name statute was "very clear," and held "[t]his Court will not rewrite the statute." *Id.*

Similarly, in *Dover v. Sadowinski,* 194 Cal. Rptr. 866 (Cal. Ct. App. 1983), plaintiff argued that the defendants negligently caused the death of his wife. After the statute of limitations expired, plaintiff attempted to substitute the defendant physician for a "John Doe" defendant. *Id.* at 867. The court found dismissal proper, noting that the plaintiff's attorneys had admitted that they were aware of defendant's identity but – as Stevens' attorneys did here – argued that they simply did not know how "deeply" the defendant was involved. *Id.* at 869. The court rejected plaintiff's attempt "to create a new standard to be applied in the application of [the fictitious name statute that] . . . the plaintiff must be aware of each

and every detail concerning that person's involvement." *Id.*[9]

Under Montana law, mere knowledge of NPC's identity, without more, would be sufficient to render Montana's fictitious name statute unavailable as an excuse for her late filing. Here, however, Stevens and her attorney knew far more. Based on her own

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[9] *See also Gordon v. Kawamoto,* No. B211948, 2010 WL 1408986, at *9 (Cal. Ct. App. Apr. 9, 2010) (amended complaint naming Doe defendants did not relate back to filing of original complaint because plaintiff should have known the identities of substituted defendants at the time he filed his original complaint; defendants' names were in his medical records and plaintiff knew he had been treated at defendants' hospital); *Lomas v. Dragosz,* No. D054831, 2010 WL 629495, at *5 (Cal. Ct. App. Feb. 24, 2010) (affirming summary judgment because plaintiff knew identity of Doe defendant at time she filed original complaint where plaintiff had previously read traffic accident information card that included Doe defendant's name); *Carey v. Hackensack Univ. Med Ctr.*, 2009 WL 4547211, at *5 (N.J. Super. Ct. App. Div. Dec. 3, 2009) (plaintiff who was aware of defendant's identity could not use fictitious name statute to avoid limitations period, despite plaintiff's contentions that he was unaware of a potential theory of liability against defendant until after limitations period had expired); *Powell v. Coffee Beanery, Ltd.*, 965 F. Supp. 971, 975-76 (E.D. Mich. 1997) (rejecting plaintiff's argument that he was ignorant of "the name" of the defendants within the meaning of California's fictitious name statute since he did not understand that the facts would give rise to a claim); *Miller v. Thomas*, 175 Cal. Rptr. 327 (Cal. Ct. App. 1981) (rejecting fictitious name argument for tolling of limitations where plaintiffs' attorney was aware of the identity of the late-named defendant, and holding that a person who is knowingly omitted from a complaint may not be joined as a fictitiously named party after the statute of limitations has run).

pre-suit research, Stevens believed that she had been inadequately warned, and sued Dr. Schmidt for it. In her research she learned not only that NPC made Zometa®, but also obtained the NPC warnings in effect prior to her injury and a Dear Doctor letter sent out after her injury, which her lawyer called at trial "the first clear signal sent by Novartis to anybody that these [dental] extractions [in patients on Zometa®] should be avoided." (Tr. 1675:17-19.) Stevens provided these to her lawyer. There is no precedent in Montana for any plaintiff with such knowledge claiming – under any legal pretext, including the fictitious name statute – that her ignorance permitted her to file suit without timely naming a defendant known to her. If the decision of the trial court in this case is not overturned, any plaintiff who simply names a John Doe in her initial complaint will be able to argue that she may add defendants for years and years after the expiration of the statute of limitations because she belatedly learned "the nature of the defendant's culpability."[10] The decision must not be allowed to stand, and judgment should be entered in favor of NPC as a matter of law.

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[10] Here, Stevens has argued that she did not know about the extent of NPC's misconduct underlying her cause of action until "mid-July [2009]," *after* suing NPC and gaining access to "literally hundreds of thousands of pages of documents." (*See* PL's Reply Supp. Mot. File Second Am. Compl. 7; *see also* Tr. 827:23-828:2 (Stevens testifying that she did not know "the *extent* of Novartis's knowledge" prior to filing her suit against Novartis).) There is no limit to the exception that Stevens would create within Montana limitations law.

3. Stevens' claimed ignorance of the identity of an NPC sales representative who was later dismissed with prejudice has no bearing on the untimeliness of her action against NPC.

At the same time that she named NPC as a defendant, Stevens also named NPC sales representative Patrick Doyle. Doyle moved for dismissal of this claim, which was independent of the claim against NPC, and the trial court properly granted the motion on the ground that no claim could be asserted against him.[11] Stevens has tried to bootstrap her claim that she was ignorant of the identity of *NPC* by claiming that she was ignorant of the identity of one of NPC's agents, Doyle.

Stevens' knowledge of Doyle is irrelevant. Under Montana law, a plaintiff has a cause of action against all entities in the chain of distribution of an allegedly defective product, including retailers and distributors as well as manufacturers such as NPC. *See Durden v. Hydro Flame Corp.*, 1999 MT 186, ¶ 19, 295 Mont. 318, 983 P.2d 943. As such, regardless of whether Doyle was or was not employed by NPC, NPC's liability as the manufacturer of the product at issue would be independent – exactly as Stevens alleged and litigated in this case.

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[11] (4/7/09 Opinion & Order at 6-8 (dismissing claim against Doyle for fraudulent joinder).)

C. In the alternative, NPC is entitled to a new trial because the trial court refused even to instruct the jury on NPC's limitations defense.

Compounding its legal error, the trial court refused *both sides'* proposed jury instructions and verdict form questions regarding the statute of limitations, Pl.'s Proposed Instr. No. 40-42, NPC's Proposed Instr. No. 1-3, and NPC's Proposed Verdict Form, thus erroneously resolving as a matter of law the question of whether Stevens had timely sued NPC. (Tr. 1611:6-1614:8.) Even if Stevens' novel assertion that the statute had been tolled until she discovered her cause of action against NPC were correct, limitations is a jury question "when there is conflicting evidence as to when the cause of action accrued." *Hill v. Squibb & Sons, E.R.*, 181 Mont. 199, 212, 592 P.2d 1383, 1390-91(1979). The trial court previously held that a "genuine issue of material fact" precluded summary judgment on the statute of limitations. (*See* 10/8/09 Order 6.) Contrary to its holding and despite the record in this case,[12] the trial court then took the issue away from the jury, which

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[12] (*See* Tr. 827:23-828:2 (Stevens testifying that she had no understanding of her claim prior to the time of her lawsuit against NPC); *but see supra* pp. 19-20 (establishing that Stevens was aware at the time of the original complaint against Dr. Schmidt of all facts necessary to state a claim against NPC); Tr. 1313:8-1315:5, 1325:11-1330:11 (NPC's FDA expert Dr. Arrowsmith testifying regarding NPC's ONJ warnings prior to Stevens' dental surgery).)

entitles NPC to a new trial, if judgment is not entered.

* * *